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January 3, 2012

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

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ENTERED
Office of Proceedings

JAN 03 2012

Part of
Public Record

Re: **Finance Docket No. 35468**
Pinelawn Cemetery -- Petition for Declaratory Order

Dear Ms. Brown:

New York & Atlantic Railway Company ("NY&A") hereby moves to strike from the record the letter from counsel for Pinelawn Cemetery dated and filed in the above-captioned proceeding on December 20, 2011. The letter purports to respond to the comments filed herein more than two months earlier, on October 11, 2011, by the Association of American Railroads. The letter also says it responds to a filing six weeks earlier by the American Short Line and Regional Railroad Association, although the letter never references that filing again.

Board rules require responsive papers to be filed within 20 days, unless otherwise provided. 49 C.F.R. § 1104.13(a). No good cause was shown or even suggested to justify this filing or its dilatory timing. Accordingly the letter should be stricken from the record. Pinelawn has had its opportunity to submit its case and it did so. It is not entitled to the "last word" simply to reargue its prior submissions.

Moreover, Pinelawn's letter should be disregarded in any event because it is misleading on its face. Pinelawn brazenly misrepresents the decisions of the STB, as well as the uncontroverted record in this case. Pinelawn claims that the Farmingdale Yard "has never been used for 'rail transportation' purposes," citing this Board's October 15, 2009 decision in *Town of Babylon and Pinelawn Cemetery -- Petition for Declaratory Order*, Finance Docket No. 35057. In fact, this Board recognized that rail transportation was being performed at Farmingdale, but held that the transportation activity was not being performed "by a carrier." On appeal, the Second Circuit specifically held that "there is no question that the activity at issue here constitutes 'transportation' within the meaning of the statute. The only argument is whether the activities were performed by or under the control of a rail carrier." *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 73 (2nd Cir. 2011). The court affirmed this Board's decision

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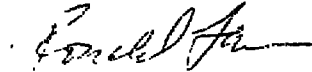
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that the admitted transportation activities fell outside the Board's jurisdiction solely because they were not currently performed "by a rail carrier."

There is no basis whatsoever for Pinelawn to suggest now that this Board has somehow already determined that Farmingdale Yard "has never been used for 'rail transportation' purposes." To the contrary, the record before this Board establishes beyond cavil that the Yard has in fact consistently been used for railroad purposes for over a century, albeit that a substantial portion of those railroad activities have been carried out during the last several years by a non-carrier.

For the foregoing reasons, the Board should strike Pinelawn Cemetery's December 20, 2011 letter from the record and disregard the statements contained therein.

Respectfully submitted,



Ronald A. Lane
Attorney for New York & Atlantic
Railway Company

RAL:tjl

cc: Jessica P. Driscoll, Esq.
Jay Safar, Esq.